IN THE HIGH COURT OF BOMBAY AT GOA.

FIRST APPEAL NO. 55 OF 1997.

Shri Cedric de Souza Faria
alias Cedric de Souza,
r/o H. No. 1, Opp.
Tarsazor, Aquem Alto,
Margao. ... Appellant.

Versus

Shri Ricardo Sequeira,
r/o Campal, Panaji. ... Respondent.

Mr. M.S. Sonak with Miss P. Bharne, Advocates for the Appellant.

Mr. V.K. Bodke, Advocate for the Respondent.

Coram : P.V. HARDAS, J.

Date : 6th February 2004.

ORAL JUDGMENT.

This is an appeal at the instance of the original plaintiff, who is aggrieved by the Judgment and Decree rendered by the Civil Judge, Senior Division, Panaji, dated 29th June 1996, in Special Civil Suit No. 17/82/A, dismissing the suit filed by the appellant and decreeing the counter-claim of the respondent/defendant.

2. The facts, in brief, as are necessary for the decision of this appeal are set out hereunder:-

The appellant/plaintiff filed Special Civil Suit No. 17/82/A, in the Court of the Civil Judge, Senior Division, Panaji, for recovery of money, damages, declaration and cancellation of documents. In the

plaint it was averred by the appellant/plaintiff that there exists an Agreement, dated 9th July 1981, between the plaintiff and the defendant, to take on hire purchase a 46 feet fishing trawler known as 'La Paloma', fitted with 6 cylinders Layland Marine Engine and a hull made of wild jack and madti wood with galvanized gauge, winch and other accessories. The plaintiff further averred that on execution of the said Agreement, he paid a sum of Rs. 16,850/- to the defendant and also executed a promissory note for an amount of Rs. 5,000/- and by the said Agreement agreed to pay on behalf of the defendant a sum of Rs. 2,33,300/- due and owing by the defendant to the Bank of Baroda, Panaji, which had financed the trawler.

3. The plaintiff further averred that the defendant handed over the possession of the trawler to the plaintiff and the plaintiff thereupon engaged crew for the purpose of commencing work of repairing the trawler, so as to keep the same in sea-worthy condition for plying in the fishing season from September 1981 to May 1982. The plaint then avers that the plaintiff had incurred an expense of Rs. 13,500/- for the repairs etc.. After repairing the trawler, the plaintiff plied the trawler for less than 50 hours. On 9th September 1981, when the trawler was anchored at the fishing jetty near the Nehru Bridge, Panaji, the defendant forcibly

entered the trawler in possession of the plaintiff and by threats forced the crew of the trawler to abandon the trawler and possessed the same and shifted the same near the Captain of Ports Office jetty.

The plaint then averred that the plaintiff had not committed any default as the first instalment was due and payable on 1st October 1981. The plaintiff, therefore, prayed for a decree in the sum of Rs. 30,350/-, which included Rs. 16,850/- advanced to the defendant and Rs. 13,350/- incurred on repairs of the trawler alongwith interest at the rate of 18% per annum. The plaintiff also prayed for a decree in the sum of Rs. 30,000/- as damages with interest at the rate of 18% per annum from the date of filing the suit till Judgment and future interest. The plaintiff also prayed for cancellation of the promissory note, dated 9th July 1981. The plaintiff prayed for a declaration that the defendant was not entitled to enforce the Agreement, dated 9th July 1981.

4. The defendant/respondent filed written statement denying that the plaintiff had paid a sum of Rs. 16,850/-. The defendant admitted having delivered the possession of the trawler to the plaintiff. The defendant denied that the plaintiff had engaged crew for repairing the trawler and that any repairs were carried

out. According to the defendant, the trawler was in good operational and running condition and there was no necessity for carrying out repairs at all. The defendant also stated that, on 9th September 1981, the plaintiff had utilized the trawler for a bumper fishing catch in the month of July/August 1981 and the trawler was continuously engaged by the plaintiff for fishing. The defendant also denied that he had taken possession of the trawler by force. The defendant, in fact, contended that the defendant was forced to pay the insurance for the trawler by paying an amount of Rs. 1,167.25 and incurred a further expense of Rs. 1,167.25 as insurance for the month of August. The defendant further contended that, on 9th September 1981, he learnt that the plaintiff was making preparations for leaving Goa waters for Harnai in Maharashtra and being perturbed by the behaviour of the plaintiff, contacted the plaintiff to confirm the same. Ultimately the plaintiff abandoned the trawler and the defendant had no alternative but to direct the operators of the trawler not to leave Goan waters until the defendant gives his consent. Since the plaintiff had abandoned the trawler, the defendant brought the same near the jetty of Captain of Ports and informed the plaintiff that he can take back the trawler after fulfilling the terms of the contract entered between them. In the counter-claim the defendant, therefore, prayed that a decree be passed

against the plaintiff for an amount of Rs. 50,000/- together with interest at the rate of 18% per annum from 9th September 1981 till payment. In paragraph 39 of the counter-claim the break-up of Rs. 50,000/- is given by the defendant.

5. In view of the pleadings of the parties, the learned trial Court framed the following issues:-

> "1. Whether the plaintiff proves that it is the defendant who committed the breach of the Agreement dated 9.7.1981?
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> 2. Whether the plaintiff proves that he is entitled for cancellation of the promissory note dated 9.7.1981?
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> 3. Whether the plaintiff proves that he carried out the repairs and maintenance in the sum of Rs. 13,500/- to the suit trawler?
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> 4. Whether the plaintiff proves that on account of the breach of the contract by the defendant, he suffered a loss of Rs. 30,000/-?
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> 5. Whether the plaintiff proves that on 9.9.81 the defendant forcibly boarded the suit trawler when it was anchored at the fishing jetty, Panaji and when it was in possession of the plaintiff and took away the same after forcing the plaintiff's crew to get down therefrom and took the same near the Captain of Ports Office, Panaji?
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> 6. Whether the plaintiff proves that the defendant has sold away the suit trawler immediately after the plaintiff's application for attachment was disposed off?
>
> 7. Whether the plaintiff proves that he is entitled to recover from the defendant the above damages alongwith

the sum claimed in prayer (a) and the interest?

8. Whether the defendant proves that the plaintiff had made all preparations to leave Goa with the suit trawler for Harnai in Maharashtra and therefore he took away the said trawler as the plaintiff owed him money and also the dues to the Insurance Company?

9. Whether the defendant proves that on account of the breach of the Agreement dated 9.7.1981 by the plaintiff suffered the loss and damages and, hence, is entitled to recover from the plaintiff a sum of Rs. 50,000/- alongwith the interest?

10. Whether the defendant proves about the forcible taking away of the batteries from the suit trawler by the plaintiff on 24th February 1982?

11. Whether the defendant proves that the defendant was married under the regime of Communion of Assets?

12. Whether the defendant proves that the suit trawler was taken away by him as the plaintiff committed breach of the Hire-Purchase Agreement dated 9.7.1981?"

6. The plaintiff examined himself as P.W.1 and Anjelo Pinto as P.W.2. The defendant examined himself as D.W.1, Thomas Cardozo as D.W.2 and Thomas Pereira as D.W.3.

7. The learned trial Court found that issues 1 to 7 were not proved while issues 8 to 12 were proved. The learned trial Court, therefore, dismissed the suit of the appellant/plaintiff and decreed the counter-claim of the respondent/defendant.

8. At the outset Mr. Sonak, the learned counsel appearing on behalf of the appellant, has stated that the appellant restricts the scope of the appeal to the decree passed by the trial Court in the counter-claim. In view of this statement, the evidence is being appreciated in respect of the counter-claim of the respondent/defendant.

9. The learned trial Court has dealt with the evidence of the respondent/defendant in relation to the counter-claim at pages 15, 16 and 17 of the Judgment. The learned trial Court accepted that the defendant has been able to establish the repairs carried out to the trawler after the possession of the same was abandoned by the plaintiff and, accordingly, decreed the counter-claim of the defendant for Rs. 50,000/-.

10. The respondent/defendant in paragraph 40 of the written statement/counter-claim has stated that assuming that the plaintiff is entitled for adjustment of Rs. 16,700/-, which was paid to the defendant at the time of the Agreement, the defendant is still entitled to recover from the plaintiff the sum of Rs. 50,166.25. Thus, there does not seem to be any serious challenge to the fact that the plaintiff had paid an amount of Rs. 16,700/- to the defendant at the time of the Agreement. The evidence of the respondent in respect of the loss of

two batteries, which he valued in the counter-claim at Rs. 1,540/-, is extremely vague. The respondent states that some time in February 1982 one of the persons employed on the trawler came and informed him that the two batteries of the trawler were removed and taken away by three persons and gave the description of the persons and the description of one of the persons tallied with the description of the plaintiff. The name of the said person in whose presence the batteries were removed and who informed the respondent has not been disclosed. The evidence in respect of the loss of batteries is totally hearsay evidence and, therefore, no weight can be attached to the said evidence. The defendant has further stated that he had paid an amount of Rs. 6,740/- as wages to the crew. Beyond the bald statement of the respondent/defendant, there is no evidence evidencing payment to the crew. The respondent/defendant further states that he paid an amount of Rs. 12,300/- towards the repairs of the trawler. The bills of repair are at Exhibit D.6 Colly. An objection to exhibiting the said bills was taken at the time of recording the evidence and the learned trial Court had reserved the order on the question of admissibility of the bills at the time of arguments. It was incumbent upon the respondent/defendant to have examined the person or persons who had carried out the repairs and had issued the bills. Mere production of

the bills would not prove that the respondent/defendant had incurred the said amount towards the expenses for repairs. So, therefore, this amount of Rs. 12,300/- also, according to me, has not been proved by the respondent/defendant. The defendant has also claimed an amount of Rs. 15,000/- and Rs. 25,000/- on account of the trawler lying idle. No evidence is led by the defendant, apart from his own statement and the statement of the witnesses that had the trawler been effectively used during the fishing season, he would be able to earn the aforesaid amount. According to me, what the defendant has been able to establish is the payment of Rs. 5,386.25 towards the insurance premium of the trawler.

11. The learned trial Court, while decreeing the counter-claim, has not appreciated the evidence at all but has mechanically accepted the contention of the defendant. Since the defendant/respondent has not been able to prove satisfactorily that when he received the trawler from the plaintiff, the same was not in a sea-worthy condition and was required to carry out the repairs. The respondent/defendant, according to me, is, therefore, not entitled to claim damages on account of the trawler lying idle. As held by me earlier, the defendant has been able to establish that he has paid the insurance premiums. Admittedly, the plaintiff had

paid an amount of Rs. 16,700/- to the defendant and the suit of the plaintiff has been dismissed and the learned counsel for the plaintiff only seeks to challenge the decree in the counter-claim and, as such, in view of the payment made by the plaintiff to the defendant, which is in excess of the insurance premiums, according to me, the counter-claim of the defendant deserves to be dismissed.

12. Accordingly, First Appeal is partly allowed. The decree passed by the learned trial Court decreeing the counter-claim of the defendant against the plaintiff is, hereby, quashed and set aside. While the decree dismissing the suit of the appellant/plaintiff is confirmed. In the circumstances the parties are left to bear their own costs. Decree be drawn, accordingly.

(P.V. HARDAS)
JUDGE.

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